

**LEELAWATHIE  
VS  
ABEYKOON AND OTHERS**

COURT OF APPEAL.  
EKANAYAKE, J.  
SRISKANDARAJAH, J.  
CALA 357/2001. (LG)  
DC GAMPAHA 748/P.  
FEBRUARY 28, 2005.  
OCTOBER 28, 2005.

*Partition Law, No. 21 of 1977, sections 26(2), 32 and 36(1)(a)-Judgment entered-Partition according to the interlocutory decree-Scheme of Inquiry-Court ordered sale of a Lot-Is it permissible ?*

The court entered judgment/decree granting 1/2 share to the plaintiff and the 1st and 2nd defendants and the balance 1/2 share to the 1-6 defendants.  
2-CM 7219

After the scheme inquiry, the court ordered a particular lot in extent 1.885 perches to be sold. It was contended that, as there is no such order to sell in the interlocutory decree/judgment, the District Judge acted without jurisdiction in ordering a sale of the said Lot.

**HELD:**

- (1) Section 36(1) provides that, Court could confirm the scheme of partition with or without modification, and section 36(2) empowers the court to order the sale of any Lot.
- (2) When preparing a scheme of partition in conformity with the interlocutory decree the Surveyor has to comply with section 31(2), if a divided portion that is to be allotted to any person is less than the minimum extent required by law for development purposes section 31(2) becomes applicable. Thereafter court as provided under section 36(1) merely acts under sub section (a) and or (b) of section 36(1) and enter the final decree.
- (3) It is clear that a court may order sale of any Lot after entering the interlocutory decree provided that the surveyor while returning the commission has reported to court under section 32(1)c that the extent of such lot is less than the minimum extent required by written law relating to the sub division of land for development purposes.
- (4) The District Court has without any evidence after an inspection of the corpus drawn certain inferences to the effect that, the Urban Council would not permit to construct a building on the said lot and decided to sell the said lot by public auction—this is wrong.

**APPLICATION** for Leave to Appeal from the order of the District Court of Gampaha.

*Chula Bandara for plaintiff petitioner,*

*Manohara R. de Silva for 3rd-6th respondents.*

*Cur. adv. vult.*

12th September, 2005.

**SRISKANDARAJAH J.**

The Petitioner by this Leave to Appeal application has sought to set aside the order of the learned District Judge dated 24.09.2001. Leave was granted by this Court on 07.07.2004 on the question whether the Order of the Learned District Judge directing the sale of Lot 4 shown in the final

Partition Plan which was allocated to the Plaintiff Petitioner without the Plaintiff-Petitioner's consent is correct.

The Plaintiff Petitioner instituted this Partition action to partition a land called Udawelagedara Watta in extent of 21 perches, morefully described in the schedule to the plaint. After trial judgment was delivered on 09.10.2000. According to the judgment the Plaintiff and the 1st and 2nd defendants are entitled to 1/2 share and the balance 1/2 share was allotted to the 3rd to 6th defendant. The interlocutory Decree had been entered on 05.12.2000. A commission was issued to the licensed surveyor who prepared the Preliminary Plan No. 224 to partition the corpus according to the Interlocutory Decree and to submit the scheme of partition along with his report. The scheme of partition as per Plan No. 433 dated 16th March, 2001 was submitted to court on 19th March, 2001. Objections to the scheme of partition were filed and the parties filed their written submissions on their objections. The learned District Judge visited the corpus on 18.09.2001 and the order on the objections to the scheme of partition was delivered on 24th September, 2001. In this order the learned District Judge directed that Lot No. 4 depicted in Plan No. 433 in extent 1.885 perches be sold at a fiscal auction and the Plaintiff had been made entitled to the proceeds of the sale.

The Petitioner submitted that by the subsequent Order made on 24th September, 2001 to sell Lot 4 of the corpus the District Judge had altered his own Judgment dated 9th October, 2000 and the interlocutory decree. In terms of section 26(2) of the Partition Law No. 21 of 1997 the order for sale of any portion of the corpus must be so stated in the interlocutory decree and Judgment and there is no such order in the interlocutory decree. Therefore the Learned District Judge had acted without jurisdiction in ordering the sale of Lot 4 of the corpus.

It was submitted by the Respondents that section 36(1)(a) of the Partition Law provides that the Court could confirm the scheme of partition with or without modification and section 36(1)(b) empowers the Court to order the sale of any lot. Therefore there is no error in the order of the learned District Judge dated 24th September 2001.

The surveyor when preparing a scheme of partition in conformity with the Interlocutory Decree has to comply with sub section (2) of section 31 of the Partition Law, if a divided portion that is to be allocated to any

person is less than the minimum extent required by law for development purpose.

Section 31(2) provides :

“Whereas any divided portion or portions that are to be allotted to any person under an interlocutory decree are less than the minimum extent required by written law regulating the sub division of land for development purposes, the surveyor shall, so far as is practicable, divide the land in such a manner as would enable the allotment or sale of such portions as one lot”

The surveyor when returning the commission under section 32 among other particulars required to be submitted under this section has to submit the plan of partition prepared by him and a report explaining the manner in which the land has been partitioned with details of parties, their shares and interest. This report should contain a statement drawing the attention of court where any extent of a share is less than the minimum extent required by any written law relating to sub-division of land for development purposes.

After consideration of the scheme of partition as provided under section 36(1), the Court may act under sub section (a) and/or (b) of section 36(1) and enter the final decree of partition.

Section 36(1) : On the date fixed under section 35, or on any later date which the Court may fix for the purpose, the Court may, after summary inquiry :

- (a) Confirm with or without modification the scheme of partition proposed by the surveyor and enter final decree of partition accordingly ;
- (b) Order the sale of any lot, in accordance with the provisions of this law, at the appraised value of such lot given by the surveyor under section 32, where the Commissioner has reported to court under section 32 that the extent of such lot is less than the minimum extent required by written law relating to the subdivision of land for development purposes and shall enter final decree of partition subject to such alteration as may be rendered necessary by reason of such sale. (2)...

From the above provisions it is clear that a Court may order sale of any lot after entering the interlocutory decree in accordance with the provisions of the Partition Law provided that the surveyor while returning the commission has reported to court under section 32 (1)(c) that the extent of such lot is less than the minimum extent required by written law relating to the sub division of land for development purposes.

In the instant case the surveyor returned the commission on 19.03.2001 and submitted the final scheme of partition but in the report submitted with the scheme of partition he has not made any statement to the effect that any of the lots has an extent which is less than the minimum extent required by any written law relating to sub-division of land for development purposes. The scheme of partition indicated in plan No. 433 dated 16th March, 2001 consist of five Lots out of which Lot 1 and Lot 2 are smaller in extent than Lot 4. The learned District Judge without any evidence after an inspection of the corpus has drawn certain inferences to the effect that the Urban Council would not permit to construct a building on Lot 4 and decided to sell the said Lot by public auction. For the above reasons this Court sets aside the Order of the learned District Judge dated 24th September, 2001 in case No. 748/P District Court of Gampola and directs the Learned District Judge to reconsider the objections to the scheme of partition and make an appropriate order under section 36. The appeal is allowed without costs.

**EKANAYAKE, J.** — I agree.

*Appeal allowed.*

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